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In the Supreme Court of the United States

OCTOBER TERM, 1979

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
PETITIONER

v.

STATE OF IDAHO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

WILLIAM ALSUP
Assistant to the Solicitor General

JACQUES B. GELIN
EDWARD J. SHAWAKER
Attorneys
Department of Justice
Washington, D.C. 20530

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at 595 F.2d 524. The opinion of the district court (Pet. App. 2a-29a) is reported at 417 F. Supp. 873. The opinion of the Interior Board of Land Appeals (Pet. App. 30a-38a) is reported at 21 I.B.L.A. 210.

JURISDICTION

The judgment of the court of appeals (Pet. App. 43a) was entered on April 19, 1979. Mr. Justice

Stevens subsequently entered an order enlarging the time in which to petition for a writ of certiorari to August 17, 1979, and a petition was filed on August 16, 1979. On October 15, 1979, this Court granted certiorari (A. 32). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Carey Act, 43 U.S.C. 641, requires the Secretary of the Interior indefinitely to reserve from appropriation for other public or private uses some 2.4 million acres of desert land within Idaho for the eventuality that the State may be able and willing to select all or any part of such acreage for irrigation and reclamation under the Act.

STATUTES INVOLVED

The Carey Act of Aug. 18, 1894, ch. 301, Section 4, 28 Stat. 422, 43 U.S.C. 641, and the Act of Mar. 15, 1910, ch. 96, 36 Stat. 237, 43 U.S.C. (1970 ed.) 643, repealed by Section 704(a) of the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2792, are set forth at Pet. 2-5.

STATEMENT

1. In order to reclaim and populate arid lands of the West, the Carey Act, Section 4 of the Act of Aug. 18, 1894, ch. 301, 28 Stat. 422, 43 U.S.C. 641, "authorize[s] and empower[s] the Secretary of the Interior with the approval of the President," to con-

tract to grant and patent "desert lands" to any state in which there are such lands, in exchange for the state's agreement, among other things, to cause the land to be irrigated, reclaimed, cultivated, and settled.[1] After a state's application for a grant has been approved, the land is segregated from the public domain for a period of from three to 15 years for the purpose of allowing the state to cause an adequate irrigation system to be constructed and a sufficient water supply to be made available. Upon satisfactory proof that the conditions of the contract have been fulfilled, patents must be issued to the state or its assigns for the land reclaimed.[2] Originally, no state could receive more than one million acres of land for Carey Act development. In 1908, however, Congress raised the ceiling for Idaho to three million acres. Act of May 27, 1908, ch. 200, Section 1, 35 Stat. 347, 43 U.S.C. 645;[3] Pub. Res. 28, 35 Stat. 577; see generally 42 Fed. Reg. 18100 (1977) (proposed Carey Act regulations).

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[1] "Desert land" is land which will not yield an agricultural crop without irrigation. See 43 U.S.C. 322, 641.

[2] The Carey Act requires that the land conveyed to the States be used for actual settlement by individuals. In the Act of June 11, 1896, ch. 420, 29 Stat. 413, 434-435, however, Congress permitted the Secretary to patent land to states prior to actual settlement and cultivation, provided that water had been furnished to the land. This statute also authorized liens against the land prior to patent.

[3] This statute also raised the limitations for Colorado, Nevada, and Wyoming to two million acres.

In 1910, the Secretary was authorized to withdraw desert lands temporarily from the public domain, upon request by a state, but prior to its submission of a formal plan under the Carey Act. Act of Mar. 15, 1910, ch. 96, 36 Stat. 237, 43 U.S.C. (1970 ed.) 643.[4] This legislation was added to prevent speculative filings under entry statutes on land contemplated by a state for a Carey Act project. S. Rep. No. 367, 61st Cong., 2d Sess. (1910); H.R. Rep. No. 662, 61st Cong., 2d Sess. (1910).

No state has reached its ceiling of land permitted under the Act. To date, Idaho has received approximately 600,000 acres of land under the Act. See Report of the Director of the Bureau of Land Management Table 114 (1952) (the most current report on the Carey Act). Most patents under the Carey Act were issued in the early years of this century when ready water sources were more conveniently located to arid land. As water sources became increasingly unavailable to arid lands, new Carey Act projects began to dwindle and by 1952 were all but nonexistent. Recent improvements in technology for pumping water from deep wells and river canyons, however, have revived interest in Carey Act developments.

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[4] After the district court's decision and judgment, this provision was repealed by Section 704(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), Pub. L. No. 94-579, 90 Stat. 2792. Section 204 of FLPMA, 43 U.S.C. 1714, however, gave the Secretary general authority to make withdrawals. The Secretary construes his authority under Section 204 to allow him to withdraw public lands from entry pending submission of a formal plan under the Carey Act.

2. In 1974, respondent State of Idaho, invoking Section 643, requested that the Secretary withdraw temporarily a specified tract of 27,400 acres in Idaho pending the State's submission of a proposed development plan under Section 641 (Pet. App. 31a-32a). On January 24, 1975, the Bureau of Land Management rejected the application for a temporary withdrawal because the land had been withdrawn for other purposes including, as to some of the land, stock-driveway purposes (*id.* at 31a, 33a).[5] The State appealed BLM's action to the Interior Board of Land Appeals only with respect to the lands withdrawn for stock-driveway purposes (*id.* at 33a). The State simultaneously petitioned the Board, pursuant to Section 7 of the Taylor Grazing Act, 43 U.S.C. 315f, to classify the tract as suitable for development under the Carey Act (*id.* at 34a).

The State argued that the Carey Act gave Idaho the right to three million acres of public land for Carey Act developments and that this right vested in 1894 when the Act became law and takes precedence over subsequent withdrawals and uses (Pet. App. 36a). Accordingly, the State contended that the Secretary has no discretion under Section 643 to deny

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[5] Under the authority of 43 U.S.C. (1970 ed.) 141; Exec. Order No. 10,355, 17 Fed. Reg. 4831 (1952), the Secretary withdrew the lands in 1955 for driveways for stock. See Act of Dec. 29, 1916, ch. 9, Section 10, 39 Stat. 865, 43 U.S.C. (1970 ed.) 300, repealed and replaced by the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, Sections 204, 704(a), 90 Stat. 2792, 43 U.S.C. 1714; 43 C.F.R. 2313.1(c) (stock driveways).

Idaho's request so long as the lands requested were desert lands (Pet. App. 36a). On July 31, 1975, however, the Board held that Section 641 "is couched in discretionary language authorizing and empowering—not requiring—the Secretary to contract and agree with the states to donate, grant, and patent lands" (*ibid.*). The Board affirmed the refusal to withdraw the lands and directed the petition for classification to the BLM for initial consideration (*id.* at 38a).

3. On February 21, 1975, several months before the Board's decision, the State filed the present action in the United States District Court for the District of Idaho against the Secretary of the Interior. The complaint alleged that the Secretary had notified the State (i) that he would not allow "requests for segregation or withdrawal under the Carey Act as a matter of right" and (ii) that he had the authority to refuse to convey lands under the Carey Act even though they are in fact desert lands and suitable for agricultural use (A. 5-6). The complaint sought a declaratory judgment that the Secretary's policy violated the Carey Act.[6] The Secretary's answer admitted that he would not allow requests for segregation or withdrawal under the Carey Act as a matter of right (A. 24).

On cross motions for summary judgment (A. 28-31), the district court agreed with the Secretary that

[6] The complaint also alleged that another policy of the Secretary concerning the amount of acreage available to a family violated the Act (A. 6-22). The courts below decided this issue against the Secretary, and the Secretary did not seek certiorari on this issue (see Pet. App. 28a).

the Carey Act did not make a grant in praesenti to the State, and that the State did not have a right to select any particular desert lands for Carey Act development (Pet. App. 18a). The court, however, concluded that the Carey Act "conferred upon the State of Idaho a right of entitlement to three million acres of desert land suitable for irrigation, cultivation and settlement" and that the Secretary must preserve enough desert land to satisfy this right (*id.* at 18a-19a; emphasis added):

> The State is guaranteed a maximum entitlement of three million acres of suitable desert land for Carey Act development to select from time to time, which it cannot be deprived of by the Secretary of the Interior, if the State meets the conditions of the Carey Act. However, the State may not perfunctorily select acreage previously withdrawn for other purposes such as in this case a withdrawal for stock-driveways. *The Secretary is under an obligation to preserve enough desert land suitable for Carey Act development to fulfill the State's right of entitlement, which the Federal Government must contract to donate to the State in accordance with the Act.*

The court also held that if the State is denied an application for land for Carey Act development because that land has been withdrawn for some other use, the State's remedy is to petition the Secretary to open that land for Carey Act development, and that the Secretary's decision, once final, is reviewable in the courts (*id.* at 19a).

The district court entered a judgment against the Secretary that "ordered, adjudged and declared" that Idaho "is entitled to have withdrawn and patented three million acres of the desert lands in the public domain (as reduced by prior patents issued pursuant to the Carey Act) situate in the State of Idaho for entry under said Act, providing that there are sufficient lands of such kind, quality and character within the State of Idaho, and providing that the State of Idaho satisfies all of the terms and conditions of said Act * * *" (Pet. App. 40a). The Secretary and the State both appealed. On April 19, 1979, the Ninth Circuit affirmed in a one-sentence opinion (*id.* at 1a).

INTRODUCTION AND SUMMARY OF ARGUMENT

The Secretary objects to that portion of the judgment of the district court declaring that the State has an entitlement to an additional 2.4 million acres and that the Secretary must hold for eventual disposition under the Carey Act approximately 2.4 million acres of unappropriated desert lands.

Our submission is that the Carey Act establishes no entitlement to any public lands. The Carey Act merely "authorize[s] and empower[s]" the Secretary of the Interior, in his discretion and subject to the approval of the President, to enter into contracts to grant desert land to the states upon the condition that they reclaim it. The Act does not require the Secretary and the President to grant the maximum acreage authorized for each state. The plain language of the

statute is permissive, not mandatory, and is thus different from the unmistakable language used by Congress in making grants of public lands to other statutes. Moreover, the legislative history is quite clear on this point. The congressman who introduced the language on behalf of the House conferees stated on three separate occasions in the House of Representatives that the Act "does not make any grant, but only authorizes the Secretary of the Interior with the approval of the President to make a contract * * * for the reclamation of not exceeding a million acres in each State" or words to this effect. 26 Cong. Rec. 8391, 8431 (1894). Finally, the consistent administrative interpretation has been that acceptance or rejection of a contract offered by a state under the Act "is a matter wholly within the discretion of the Department." *State of Wyoming*, 36 Pub. Lands Dec. 399 (1908). This settled construction by the agency charged with administering the Act is sufficiently contemporaneous with its enactment that it is dispositive of any residual doubt concerning the meaning of the Act.

ARGUMENT

I. The Plain Language of the Carey Act Shows That It Established No Entitlement to Public Lands

The decisive language of the statute is permissive —not mandatory. The Secretary is "authorized and empowered" to contract to grant desert land to the state upon certain conditions. To "authorize" administrative action is not to require that it be taken. See, *e.g.*, *INS* v. *Bagamasbad*, 429 U.S. 24, 26 (1976);

Anderson v. *Yungkau*, 329 U.S. 482, 485 (1947); *Creek Nation* v. *United States*, 318 U.S. 629, 639 (1943); *United States* v. *Wilbur*, 283 U.S. 414, 418-419 (1931); *Farmers Bank* v. *Federal Reserve Bank*, 262 U.S. 649, 662-663 (1923). That Congress used "authorized" in the permissive sense is all the more apparent from the fact that the Act uses the mandatory "shall" in connection with other responsibilities under the statute (Pet. 3-4).[7]

Other features of the Act confirm our interpretation. Congress in the same breath used the word "binding" to describe the contract. It is clear that the contract, once made, was to be binding, but, equally clearly, the Secretary was given discretion whether or not to enter into such a contract in the first place. Had the statute itself created a binding right to arid lands, it would have been unnecessary to provide for any contract. The Secretary, moreover, may grant "not exceeding" three million acres to the state. Had Congress intended to confer an inchoate right to three million acres, subject only to the availability of "suitable" land, Congress would have qualified the acreage with a proviso such as "to the extent such lands are available" rather than the phrase "not exceeding."

[7] As the Court said in *Anderson, supra*, 329 U.S. at 485:

> The word "shall" is ordinarily "the language of command." *Escoe* v. *Zerbst*, 295 U.S. 490, 493. And when the same Rule uses both "may" and "shall," the normal inference is that each is used in its usual sense—the one act being permissive, the other mandatory. See *United States* v. *Thoman*, 156 U.S. 353, 360.

"Not exceeding" reflects discretion to grant less than three million acres even where the statutory conditions are met.

Furthermore, the President must "approve" all contracts under the Act. No criteria, however, are specified to guide the President. Inasmuch as it is unlikely that the President's approval was required simply to confirm the Secretary's factual determination that the statutory requirements are met, the provision for the President's concurrence must have been intended to insure that, considering all relevant factors of public policy, release of the land is in the public interest.

The plain language of the statute thus defeats any claim of right to select up to three million acres of suitable desert land. Certainly, there is nothing in the Carey Act that overcomes the presumption against statutory grants of the public domain. See *Andrus* v. *Charlestone Stone Products Co.*, 436 U.S. 604, 617 (1978).[8]

II. The Legislative History of the Carey Act Demonstrates That Congress Intended No Entitlement to Public Lands

a. By 1875 it was apparent that virtually all of the public lands in the West blessed with readily accessible water had been settled, chiefly under the

[8] For other examples of statutes in which Congress used express granting language, see 43 U.S.C. (1970 ed.) 934, 946, 962, 966; 43 U.S.C. 857, 858, 982, 983. Contrast these with, *e.g.*, 43 U.S.C. (1970 ed.) 956, 957, 959, 961, in which Congress used the words "authorized and empowered" to give discretionary authority to the Secretary.

Preemption Acts and the Homestead Act of 1862, ch. 75, 12 Stat. 392. P. Gates, *History of Public Land Law Development* 637-638 (1968) (hereafter "Gates"); B. Hibbard, *A History of the Public Land Policies* 144-170, 347-409, 424-426 (1939) (hereafter "Hibbard"). Yet vast reaches of desert and arid lands remained unreclaimed, unsettled and unproductive. At the same time, Western rivers, swollen annually by the melting mountain snows, flowed uninterrupted to the sea. One solution to this anomaly was to divert sufficient water to irrigate the deserts. Western interests, galvanized by "irrigation conventions" held throughout the West, increasingly urged Congress to undertake and to promote reclamation projects. See Gates at 635-654; Hibbard at 424-429; and note 12, *infra*.[9]

One obvious obstacle to reclamation effort, however, was its substantial cost. Reluctant to undertake the cost at national expense, Congress at first attempted to rely on private capital to finance irrigation projects. The Desert Land Act of 1877, 43 U.S.C. 321, was the first general reclamation statute.[10] It authorized immediate entry by individuals on up to 640 acres (later 320 acres) of desert lands (defined as lands exclusive

[9] As early as 1869 Utah asked for public lands to be used in promoting irrigation projects. Cong. Globe, 40th Cong., 3d Sess. 781 (1869).

[10] In 1875, a statutory experiment for disposing of desert land in Lassen County, California, provided that unsurveyed tracts not to exceed a section would be sold to certain settlers who should undertake to irrigate and reclaim it within two years. Act of Mar. 3, 1875, ch. 160, 18 Stat. 497.

of timber and mineral lands which will not, without irrigation, produce some agricultural crop) and the eventual sale to them upon proof of irrigation of the land.

Unfortunately, although a considerable amount of acreage was entered under the Desert Land Act, little was actually irrigated and patented. *Annual Report of the Commissioner of the General Land Office* 8 (1884); Hibbard at 428. A major difficulty was that ordinarily it was not possible for a single settler to finance the construction of canals and pipes over long distances and hills merely to water a small tract. Collective action and expensive capital outlays were necessary to take advantage of the Desert Land Act. See Gates at 651-652. The Act also invited many abuses. Hibbard at 428-430. For example, numerous filings under the Act by speculators who had no intention of irrigating it during the three-year period allowed for installing irrigation ditches set aside millions of acres of land that might otherwise have been settled. Large economic groups and land speculators, it has also been contended, used the Act to acquire title to the best of the arid lands with little or no serious effort to irrigate them and, with title in hand, turned their efforts to obtaining federal or state aid to finance irrigation works. Gates at 647-648.

As the difficulties under the Desert Land Act mounted, the Western States stressed two further solutions to the problem of reclamation. One was for the federal government to plan and to finance large-scale reservoirs and irrigation projects and to sell

the reclaimed land to settlers.[11] It was also proposed that the federal government cede all or virtually all public lands to the States so that the States could provide for the prompt reclamation of the land. Gates at 647-651.[12] Eventually, at the urging of President

[11] In 1888, Congress withdrew from entry or sale all public lands designated by the Geological Survey as suitable for reservoirs, canals or susceptible to reclamation by irrigation. Act of Oct. 2, 1888, ch. 1069, 25 Stat. 527. All such lands were later restored to entry in 1890 save those sites suggested by the Geological Survey for reservoir sites. Act of Aug. 30, 1890, ch. 837, 26 Stat. 391; see Hibbard at 430-431; Gates at 641-642.

[12] In support of this proposal, Representative Lanham stated in his report in 1892 for the Select Committee on Irrigation of Arid Land on an unsuccessful bill to give virtually all public lands to the western states:

> [T]he people of [the western] States and Territories, recognizing the prevailing sentiment and realizing fully all the difficulties which encompass the situation, have reached the conclusion that the General Government will never [undertake to reclaim the arid lands]. They despair of any such prospect.
>
> It would prolong this report too much to attempt an elaborate and detailed review of all the National Government has already done, the labor and money it has expended, the investigations it has conducted, the explorations it has made, the reconnaissances it has projected, the differentiations of irrigable lands it has disclosed, and the useful information and scientific *data* it has furnished in relation to the subject of irrigation and the reclamation of arid lands.
>
> It has maintained bureaus. It has employed experts. It has made surveys, topographic and hydrographic. It has measured rainfall. It has gauged streams. It has defined catchment and drainage areas. It has located reservoir sites. It has investigated storm waters and their utilization, torrential flows and their conservation, the waters upon the earth and the waters under the earth, conditions of climate, the best methods of cultivating the soil by irrigation, and the agricultural results and possibilities which follow. It has even bombarded the skies and sought through explosives to wring waters from the reluctant clouds. * * *
>
> * * * * *
>
> Why should the Government desire to longer retain proprietorship of this arid region? Why, for that matter, should it now have a vast domain of unappropriated public land? It only holds lands as a trustee and until they can be suitably settled and occupied, and is presumptively interested only to the extent that actual, bona fide settlers may be accommodated. It is not supposed that it wants to retain them in order that they may be donated to corporations or given away as subsidies.

H.R. Rep. No. 569, 52d Cong., 1st Sess. 3-4 (1892).

Theodore Roosevelt, an advocate of reclamation and conservation, Congress undertook a program of federally managed and financed reclamation in the Reclamation Act of 1902 (also known as the Newlands Act), ch. 1093, 32 Stat. 388.[13]

b. The Carey Act was enacted in 1894 when the further usefulness of the Desert Land Act seemed in doubt. The problem and policy alternatives were described in 1894 in a report of the House Committee on Irrigation of Arid Lands on a bill to require surveys for possible federal reclamation:

> There are three ways in which to [reclaim the arid lands.] [O]ne is to conduct the work

[13] The statute authorized the Secretary of the Interior to use receipts from the sales of public lands and to withdraw lands from entry as necessary for the construction of irrigation works.

under the authority and direction of the National Government; another is to transfer these lands to the States in which they are situated, under certain restrictions, looking to the protection of the homesteader, but leaving the duty of reclaiming the land and protecting the settler to the State. The other is to leave the whole question to private enterprise, trusting that combinations of capital will construct canals and reservoirs, and furnish the settler with water at such rates as will enable him to prosper.

* * * * *

* * * Those who have had no practical experience in an arid country will readily understand that one who owns the water, with an unrestricted right to charge the owner of the land for its use, is the complete master of the situation. Farmers who have been buying water of syndicates owning canals have been in a state of constant turmoil from the first. While they have been unable to pay the prices charged for water, it is a fact that in most instances those who have constructed canals and ditches have realized but little out of their investment.

* * * * *

* * * These facts make it evident that either the nation or the State should at once take charge of the settlement and reclamation of these lands. It is probable that a majority of the settlers, perhaps owing to past experiences, favor national reclamation. They are afraid that the expenditure of the large sums of money necessary to reclaim the land situated in different States would result in debauching legislatures, if not

in materially injuring the financial credit of the States interested, even if it were found that all of the new States were equal to the task imposed.

There is, however, a very strong sentiment in the West favoring the gift by the General Government of these lands to the States wherein they are situated. But it is probable that this sentiment arises from the prevalent belief that the Government will not undertake the work of reclamation.

H.R. Rep. No. 1152, 53d Cong., 2d Sess. 3 (1894).

On April 17, 1894, Senator Carey of Wyoming, on behalf of the Committee on Public Lands, reported S. 1591 to the Senate. S. Rep. No. 332, 53d Cong., 2d Sess. (1894). This measure would not have gone so far as to cede all public lands to the states but it would have permitted each State covered by the Desert Land Act to select up to one million acres of surveyed desert lands for reclamation. Upon selection, the land would have been immediately reserved from entry by operation of the statute. Patents would have been issued upon subsequent proof of reclamation. The right of selection and reservation would have been subject to a reversion to the United States to the extent such lands were not reclaimed within five years. See S. Rep. No. 332, 53d Cong., 2d Sess. (1894).[14] The Senate approved the bill on July 18, 1894. 26 Cong. Rec. 7613 (1894); see 26 Cong. Rec. 8123 (1894). The House referred the Senate bill to the House Committee on Irrigation of Arid Lands,

[14] The text of S. 1591, as passed by the Senate, is reprinted in the Appendix, *infra*.

26 Cong. Rec. 7751 (1894). That committee, however, never reported the bill to the House.[15]

c. Senator Carey, desiring prompt passage so that the legislatures of the affected states could enact enabling legislation during the coming winter sessions, moved on August 2, 1894, that the same bill be enacted as an amendment to an appropriations bill pending in the Senate. 26 Cong. Rec. 8123 (1894). The Senator advised the Senate that "[t]here must be something done in the arid-land States and Territories" and that "the Treasury of the United States will [not] be in a condition for some years to come where the Government would be willing to appropriate money for the reclamation of lands in the arid States and Territories (*ibid.*). He regarded his bill as "an experiment" under which "[n]o one can lose anything" because "title of not an acre of land [would pass] out of the Government until its reclamation, and then upon the actual payment and the actual disposal of the land to the settler" (*ibid.*). His amendment to the appropriations bill was adopted by

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[15] On August 2, 1894, Senator Carey advised the Senate that "I understand a favorable report has been agreed upon by the Committee on Irrigation in the House of Representatives." Although members of the House Committee may have informally endorsed the measure, we can find no formal report. See Superintendent of Documents, *Catalogue of the Public Documents of the Fifty-Third Congress (Mar. 4, 1893 to June 30, 1895)* 153, 296-297 (1896). That committee's only report on the subject of irrigation in that Congress was on a bill to provide for further surveys of lands and estimates of national reclamation. H.R. Rep. No. 1152, 53d Cong., 2d Sess. (1894) (see pages 15-17, *supra*).

the Senate without further debate (26 Cong. Rec. 8123 (1894)).

The appropriations bill had already passed the House when Senator Carey's amendment was adopted. 26 Cong. Rec. 3155 (1894). The amended bill then went to the conference. The House conferees were unfamiliar with the public-land issues implicated by the Senate amendment and "concluded that it was the better plan to bring it back to the House so that gentlemen with a fuller understanding of the land systems of the United States might have an opportunity to make known their objections to the legislation" (*id.* at 8388 (Rep. Sayers)). Before the full House, Representative Pickler of South Dakota moved that the House recede and accept the Senate amendment (*ibid.*). Representative McRae of Arkansas, however, on behalf of the House conferees moved as a substitute for that motion "that the House conferees be instructed to strike out the Senate amendment and insert" different language (*ibid.*). The substitute language proposed by the House conferees differed markedly from the Senate amendment, among other ways, in that it eliminated the right of selection. Representative Pickler, although "prefer[ing] the measure reported by the Senate," withdrew his motion and adopted McRae's motion for a substitute. The House then considered whether to substitute the House conferees' language for that of the Senate amendment (*id.* at 8389). Significantly, it was the substitute offered by Representative McRae that was finally passed as the "Carey" Act.

Representative McRae explained the differences between the Senate amendment and the House substitute and stated on three separate occasions during the debate on the two conflicting proposals that the House proposal would not make any grant (26 Cong. Rec. 8391, 8431 (1894); emphasis added):

> Now, Mr. Speaker, I want to state briefly what I understand to be the main difference between the two propositions. *The Senate proposition makes a reservation outright for the States and will make it possible for the States to put a million of acres in each State in reservation for an indefinite period.* It leaves the question of irrigation to be determined under rules and regulations to be made by the States themselves. In short, the States will decide whether they have complied with the conditions as to irrigation. *The pending proposition does not make any grant, but only authorizes the Secretary of the Interior with the approval of the President to make a contract with any States in which any of these lands may be situated for the reclamation of not exceeding a million acres in each State, the question of irrigation to be finally determined by the Executive officers of this Government.* No reservation or withdrawal is permitted except for temporary purposes until the plan is approved; and no title is to pass until thorough irrigation is accomplished and shown to the satisfaction of the Interior Department.
>
> If an experiment of this sort is to be made I desire to put around it all the conditions and limitations necessary to insure the irrigation of the land. This will give ample power to the

> Secretary to secure it. As the gentleman from South Dakota has said there are five or six hundred million acres of desert land—land worthless without irrigation, and very valuable with it. The United States owns the lands, but has no inclination to enter upon its reclamation. We want settlers upon all our public lands. This is simply an experiment by which it is proposed to aid the States in their efforts to reclaim the land, by remitting the price and cost of survey. We charge the individual settler $1.25 an acre for desert land when irrigated. One of the conditions of this measure is that not exceeding 160 acres shall be sold by the State to any one individual.
>
> * * * * *
>
> *If this substitute be adopted it will only authorize contracts which will lapse in ten years after their date. It is not a legislative grant; it does not require any action of Congress for its forfeiture. It does not even put the land in a state of reservation until a map is filed and the plan of irrigation is approved.*
>
> Mr. Speaker, I repeat what I stated yesterday —that I am opposed to legislating upon appropriation bills. This proposition ought to be considered by the proper committee of this House, and subjected to the same treatment as other measures are under our rules; but as it has been attached by the Senate to one of the most important of the great money bills of this House which must be acted upon by us, I think it should at least be fairly discussed and properly understood. The Senate amendment is in my judgment extremely dangerous, and should not be adopted.

[Only] yesterday I pointed out some of the objections to it, but since the gentleman from South Dakota has abandoned it and is satisfied to adopt the substitute which I offered, it is not now necessary to discuss it further. I would prefer to see no legislation at this time and in this way, but if the question can not be postponed for a more careful consideration then we should proceed with all the caution and care that is possible under the circumstances, for the legislation is important and far reaching. The amendment does not appear to be understood by some who have opposed it. It has been likened to the swamp-land grant of September 28, 1850.

That was a grant *in presenti* and passed the title as of the date of the grant. *This is no grant at all, but only gives authority to the Secretary of the Interior and President to make contracts binding the United States to donate the land to the States when reclaimed.* That act passed the title to the whole of the swamp and overflowed lands which were unfit for cultivation and unsold at that time to the States.[16] This grants nothing and authorizes no conveyance until reclamation.

No members of Congress disagreed with these statements. Representative McRae's substitute was adopted by the House as an instruction to the conferees (26 Cong. Rec. 8436 (1894)). The conference then adopted the House substitute in the final enactment. 28 Stat. 422. These clear-cut statements set forth above by the sponsor of the statutory language in ques-

[16] Rev. Stat. 2479-2484, 43 U.S.C. 982-986.

tion establish beyond question that Congress did not intend to grant any entitlement to public lands.[17] Congress only went so far as to authorize the Secretary and the President to grant public lands under the Act.

To be sure, the House debate contains comments that suggest out of context that an outright "grant" to the states was intended. Thus, some legislators referred ambiguously to "the proposition" or "the question" before the House as involving a "grant," or "gift" of arid lands to the States (26 Cong. Rec. 8392, 8398, 8419, 8420 (1894)). In context, however, it is evident that such loose language was the product of a ventilation of fundamental issues of reclamation policy—a debate that transcended the differences between the Senate amendment and the House substitute. By the mechanism of an appropriations-bill rider, the Senate had placed before the House a fundamental concept—cession of public lands to the States—that the House had not previously considered. In these circumstances, the House could hardly be expected to confine its discussion to only the differences between the Senate amendment and the proposed substitute. The broader question was whether the United States should donate land to the states under any circumstances. Both opponents and advocates of the general scheme of cessions to the states thus advanced argu-

[17] The district court erroneously suggested Representative McRae was an opponent of the House measure. See Pet. App. 12a.

ments that went to the larger issues, ignoring the differences in the two measures.[18]

In this context, it is evident that the occasional allusions to "grants" and "donations" were not in-

[18] Thus, Representative Bretz complained that cessions would lead to the same abuses that had befallen cessions under the swamp-land acts (26 Cong. Rec. 8421 (1894)), that the chief advocates of the cessions to the States were "the land syndicates of the West * * * who expect to hold still more [land] if they can get Congress to cede the lands to the States" (*id.* at 8422), that, in any event, the States could ill-afford to finance suitable projects (*id.* at 8421). Representative Cannon of Illinois felt the issues were of too much importance to be considered in "hasty legislation" and that the matters should be referred to "one or more of the great committees of this House * * *" (*id.* at 8392). On the other hand, Western legislators stressed the need for reclamation of arid lands of the benefits that would flow from reclamation (*id.* at 8393-8394, 8427-8429), that the proposal would give to the States only land that was then worthless (*id.* at 8419), that state authorities were better situated to develop arid lands than federal authorities (*id.* at 8423), although Representative Kem of Nebraska argued that federal development and financing of reclamation works were preferable to state development because private interests would obtain control from the states over the available water and require settlers to pay exorbitant rates (*id.* at 8397-8398).

Moreover, it is clear in context that most of the references to "the proposition" as "granting", "donating", or "ceding" desert lands to the states were made with regard to the Senate amendment rather than the proposed House substitute because the speaker either stated that he was commenting on the Senate proposal (26 Cong. Rec. 8391 (1894) (Pickler); *id.* at 8420-8421 (Hepburn)) or because he referred to the requirement that the State expend at least $3 per acre for reclamation, a requirement that was only in the Senate amendment (*id.* at 8421, 8422 (Bretz); *id.* at 8427 (Newlands)).

tended as precise comments on the meaning of the first sentence of the House substitute that "authorized and empowered" the Secretary of the Interior to enter into contracts for the donation of land. These broader comments were not intended to modify the very precise observations of the sponsor of the language at issue here that "[t]his is no grant at all, but only gives authority to the Secretary of the Interior and President to make contracts binding the United States to donate the land to the States when reclaimed" (26 Cong. Rec. 8431 (1894)).

d. It will be said that, even if there is no absolute grant, the Secretary, as the district court held, must manage public land so as to leave sufficient desert land to allow Idaho to eventually acquire three million acres. It is true that no statement in the legislative history explicitly addresses this precise point. In 1894 that there was so much unappropriated desert land[19] and reclamation was in such demand that it would have been unrealistic to entertain the idea the Secretary would disapprove any well-conceived plan under the Act. Nonetheless, Congress plainly realized that not all lands selected by the State would be approved by the Secretary. The whole point in deleting any right of selection was to make it clear that the Act was "no grant at all, but

[19] In 1894, the Commissioner of Lands estimated that there were 529,000,000 acres of available desert lands in 12 western states affected by the Act. The Carey Act concerned only 12 million acres. See S. Rep. No. 332, 53d Cong., 2d Sess. 4 (1894).

only [gave] authority to the Secretary of the Interior and President to make contracts * * *." 26 Cong. Rec. 8431 (1894). Authority to approve applications necessarily implies authority to disapprove applications, even at the risk of falling short of the statutory ceiling. Had Congress intended to confer an entitlement to the statutory maximum it would have been natural in these circumstances to say so.

That Congress did not intend to establish any floating entitlement to desert lands is also evident in its decision not to impede reclamation under the Desert Land Act. In 1894 it was possible for settlers to acquire all of the reclaimable desert lands in a state by entries under the Desert Land Act, carried through to patent. The Secretary had no authority to withdraw desert lands from such entry.[20] Had Congress intended to preserve indefinitely a million acres of desert lands for each state for Carey Act projects, it would have been necessary to withdraw desert lands from entry under the Desert Land Act. Representative McRae, however, stated that his substitute would not "in the least interfere with individuals who may wish to proceed under" the Desert Land Act (26 Cong. Rec. 8432 (1894)).

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[20] The President had authority to reserve public lands from entry or selection. See *United States* v. *Midwest Oil Co.*, 236 U.S. 459, 467 (1915). But, except for the establishment of Indian and military reservations, the power had been rarely used before enactment of the Pickett Act in 1910, 43 U.S.C. (1970 ed.) 141.

Similarly, even though federal reclamation projects were not immediately foreseeable in 1894, Congress had authorized surveys for such projects in anticipation of their eventuality (see page 14, note 11, *supra*). Federal reclamation projects would have eventually depleted the supply of arid lands available for Carey Act projects through the use of such lands for reservoirs and the sale of formerly arid lands so irrigated. It is inconceivable that in 1894 Congress meant to establish an entitlement that years later would prevent federal reclamation projects because it might usurp the State's "entitlement" under the Carey Act.[21]

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[21] In fact, by 1908 the Secretary of Interior began to disapprove Carey Act applications on the ground that they overlapped with applications under the Desert Land Act or national reclamation projects and such disapprovals were discussed in Congress without objection. When Representative Gaines of Tennessee asked Representative French of Idaho to explain why the Secretary had not granted all Carey Act applications, Representative French replied (42 Cong. Rec. 6437 (1908)):

> The reason is this: We have a national reclamation law under which lands are being reclaimed; we have the Indian reservation law; we have lands that have passed into private ownership under the desert-land act and other laws. Sometimes it happens that an application for segregation under the Carey Act overlaps one or more of these propositions or tracts of land. The Department sometimes finds it necessary to spend several months inquiring of the engineers in the field or the local land-office officials to ascertain whether or not the segregation overlaps.

III. Contemporaneous Construction By The Secretary And Subsequent Legislative History Demonstrate That No Entitlement To Public Lands Was Intended

Regulations issued by the Secretary in the wake of the Carey Act provided the types of information required to be submitted with Carey Act applications and advised that applications could be rejected. See General Land Office, *Regulations Concerning the Selection of Desert Lands under the Act of Congress Approved August 18, 1894*, 37 Pub. Lands Dec. 624 (1909). Even earlier, moreover, the Secretary had expressly held that he could deny an application based on "the best interests of the whole people." *Yakima Development Co.* v. *State of Washington*, 34 Pub. Lands Dec. 453, 455-456 (1906); *State of Wyoming*, 36 Pub. Lands Dec. 399 (1908).

The State argues that the *Yakima* case is not in point because the Department refused to enter into a contract with the State only because it was not satisfied that there was sufficient water to carry out the reclamation plan.[22] A full reading of the decision shows, however, that the grounds for refusing to allow the application were broader than this. After considering the extent of water resources available

[22] One of the authorities relied on by the State (Br. in Opp. 8) cites the *Yakima* and *Wyoming* decisions for the statement that acceptance of State applications "is a matter wholly within the discretion of the Land Department." III *Kinney on Irrigation and Water Rights* 2402-2403, n.10 (2d ed. 1912).

to implement the reclamation plan, the Secretary proceeded to consider the State's proposal that its Carey Act project be consolidated with a federal reclamation project:

> Not only are grave doubts entertained as to the legality of such procedure, but it is not thought *as a matter of administrative policy* that this Department would be justified in approving this very complicated, questionable, and *perhaps* impracticable scheme * * *.
>
> The Secretary of the Interior is charged by section 441 of the Revised Statutes with the supervision of the public business relating to the public lands. * * *
>
> Under *all* the circumstances of this case, *looking to what is conceived to be the best interests of the whole people, and in the exercise of the discretion thus vested in the Secretary of the Interior*, I must decline to enter into the proposed contract with the State * * *.

34 Pub. Lands Dec. at 455-456 (emphasis added).

The *Wyoming* decision in 1908 stated the same position so clearly that there could be no doubt:

> It is clear from the terms of the act of August 18, 1894, * * * that the acceptance of the offer of the State is a matter *wholly within the discretion of the Department.* The filing of the application is preliminary to the formation of a contract between the State and the United States. It is manifest that the formation of such contract depends upon the acquiescence of both parties

> thereto without a right in either to insist upon a proffer or acceptance by the other.

36 Pub. Lands Dec. at 399 (emphasis added).

This construction—which has never previously been questioned in any litigation—by the agency charged with the principal responsibility for "regulating the acquisition of rights in the public lands" is entitled to considerable deference. *Andrus* v. *Charlestone Stone Products Co., supra,* 436 U.S. at 613-614; *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965); *Cameron* v. *United States,* 252 U.S. 450, 460 (1920). Significantly, when Congress amended the Act several times after the Interior Department decisions cited above were issued, it did not disapprove Interior's interpretation.[23] We may conclude that the Secretary

[23] See, *e.g.,* Joint Resolution (S. J. Res. 51, 60th Cong., 1st Sess.), approved May 25, 1908, 35 Stat. 577, authorizing grants of an additional one million acres to the State of Idaho. Act of May 27, 1908, ch. 200, Section 1, 35 Stat. 347, 43 U.S.C. 645, authorizing grants of an additional one million acres to the State of Idaho and the State of Wyoming; Act of Feb. 18, 1909, ch. 150, Section 1, 35 Stat. 638, 43 U.S.C. 646, extending the provisions of the Carey Act to the States of Arizona and New Mexico; Act of Feb. 24, 1909, ch. 178, Section 1, 35 Stat. 644, 43 U.S.C. 647, extending the provisions of the Carey Act to the former Ute Indian Reservation in Colorado, Act of Feb. 16, 1911, ch. 900, 36 Stat. 913, extending the provisions of the Carey Act to the former Fort Bridger Military Reservation in Wyoming; Act of Mar. 4, 1911, ch. 285, Section 1, 36 Stat. 1417, 43 U.S.C. 645, authorizing grants of an additional one million acres to the State of Nevada; Joint Resolution (S. J. Res. 34, 62d Cong., 1st Sess.), approved August 21, 1911, 37 Stat. 38, 43 U.S.C. 645, authorizing grants of an additional one million acres to the State of

was not violating his statutory mandate. See, *e.g.,* *Saxbe* v. *Bustos,* 419 U.S. 65, 74 (1974); *Board of Governors* v. *First Lincolnwood Corp.,* 439 U.S. 234, 248 (1978); *United States* v. *Rutherford,* No. 78-605 (June 18, 1979), slip op. 8-9.

Subsequent legislative history confirms that Congress understood, even though it sometimes used the word "grant" loosely, that the Carey Act was not a grant at all. In considering legislation that increased the statutory ceilings in the amounts of land that could be used for Carey Act projects, for example, Representative Mondell of Wyoming observed that:

> The use of the word "grant" in this legislation is somewhat of a misnomer. There is no absolute grant of land contemplated. There is a law—the Carey Act—under which the Secretary of the Interior, if anyone of the States having arid lands assures him that a certain area of land can and will be irrigated, may temporarily withdraw these lands for the purpose of their irrigation. That experimental law, when it was passed, limited the area to a million acres in each state.

Colorado; Act of Feb. 14, 1920, ch. 74, 41 Stat. 407, 43 U.S.C. 644, giving a preference right of entry under other laws to settlers on failed Carey Act projects; Act of Jan. 6, 1921, ch. 10, 41 Stat. 1085, amending 43 U.S.C. 641, giving the Secretary of the Interior discretion to extend the period of segregation or to restore lands to the public domain upon failure of the state to construct the necessary reclamation works.

42 Cong. Rec. 6100 (1908). Representative French also explained that the administrative procedure under the Act required advance approval by the Secretary (*id.* at 6436).[24]

Congress was well aware in the early days of the Act that the Secretary had disapproved a large number of Carey Act applications. By 1908, of approximately 2.72 million acres applied for by States, the Secretary had approved only 1.08 million acres for Carey Act projects (and only approximately 200,000 acres had actually been patented). 42 Cong. Rec.

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[24] Representative French explained (*ibid.*; emphasis added):

> The reclamation under the Carey Act is done in this manner: The whole body of the million acres is not given en bloc to the State, but rather when individuals or when a company makes application to the State for the purpose of developing an irrigation project—the location of the irrigation canal, reservoir sites, or dams—they submit to the State a proposition with their bid, setting forth the manner of acres that they propose to reclaim, the total amount of money that they will ask for putting in the irrigation work, and the amount per acre which they will charge to the individual settlers.
>
> The State land board then passes upon this application. If the State land board grants it, it indorses the application and applies to the Department of the Interior. *The Department of the Interior then passes upon the question, the feasibility of it, the reliability of the company, the character of the work, and the land that will come under the irrigation canal. If the Department approves the project, it so notifies the State, and the State is authorized to enter into a contract with the individuals or company for the reclamation of the land by the building of the approved system of irrigation works.*

6100 (1908) (Report of Secretary of Interior to House Committee on Irrigation of Public Lands). As Representative French explained (see note 21, *supra*), one reason the Secretary had disapproved Carey Act projects was that the same lands were being considered for federal reclamation under the Reclamation Act of 1902 or the Desert Land Act. See also H.R. Rep. No. 2904, 56th Cong., 2d Sess. 1 (1901); S. Rep. No. 1020, 60th Cong., 2d Sess. 2 (1909); H.R. Rep. No. 1915, 60th Cong., 2d Sess. 2 (1909).

IV. This Court's Decision in *Idaho Irrigation Co.* v. *Gooding* Does Not Support The Holding Below

The district court did not offer any specific basis for its conclusion that the Secretary is obliged to preserve enough land in each state to meet the maximum statutory limits for Carey Act developments. The court evidently placed some reliance on this Court's statement in *Idaho Irrigation Co.* v. *Gooding*, 265 U.S. 518, 521 (1924), that "[b]y the Carey Act the United States *binds itself* to donate" desert lands to states. This, however, was not even a dictum and was simply part of a brief statement of the background of *Gooding*. The Court in *Gooding* plainly did not intend to address the issue presented by our petition, and in any event did not clearly contradict our position.

Gooding was brought by individuals who had purchased water rights (and corresponding shares of stock) from a company formed for the purpose of reclaiming land under the Carey Act. This water

was provided by the company's irrigation project and the individuals sued to prevent the company from selling additional rights since, as they claimed, the project could not supply sufficient water. The Court ultimately agreed and prevented the sales of additional rights. While the Court had cause to mention generally the scheme of the Carey Act (see 265 U.S. at 521), the Court gave no consideration to the issue presented here.[25]

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[25] The other authorities relied on by the State are likewise inapposite. *State* v. *Wright*, 17 Mont. 565, 44 P. 89 (1896), was an action brought by a commissioner of the state arid land board, which administered the state's duties under the Carey Act, against the state treasurer. The treasurer claimed that he lacked authority to register the warrant for the commissioner's salary. The Supreme Court of Montana held to the contrary, and ordered the warrant registered. That decision had no relevance to the issue here. *State* v. *Marshall*, 20 Mont. 510, 52 P. 268 (1898), was brought by the state attorney general against the arid land board, attacking the board's proposal for a Carey Act project. The board desired to permit the company building the irrigation system for the project to build a larger system than was necessary for the public arid lands, and sell water to a railroad for its arid lands which were "checkerboarded" with the public land. The court found no objection to this project. Although these decisions do allude to the Carey Act as a conditional "offer" that could be "accepted" by the States, the allusion was merely part of a background discussion of the facts of the case. These cases presented no occasion from the Montana courts to consider the extent to which, if at all, the Secretary most indefinitely keep available lands for Carey Act projects. *Twin Falls Land & Water Co.* v. *Twin Falls Canal Co.*, 7 F. Supp. 238 (D. Idaho 1933), was a complicated action brought by a company which built an irrigation system for a Carey Act project, against the company which ultimately operated the project. The construction company would have profited if the operating company could have sold any additional rights to water from the project, and it claimed that the operating company was improperly withholding that water from sale. The operating company prevailed in its claim that there was insufficient water. The language quoted by Idaho (Br. in Opp. 11), that the Carey Act was an "offer" by the United States which was "accepted" by the State was an aside and was only pertinent to the decision as an explanation that the state had enacted a mechanism for fulfilling its role under the Act.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

WILLIAM ALSUP
Assistant to the Solicitor General

JACQUES B. GELIN
EDWARD J. SHAWAKER
Attorneys

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APPENDIX

Senate amendment introduced by Senator Carey on August 2, 1894 (26 Cong. Rec. 8123):

> That to encourage the reclamation of arid lands, and the cultivation and sale thereof in small tracts to actual settlers, there is hereby reserved for the purposes and upon the conditions provided in this section in each of the States to which the desert-land law of the United States is applicable, and to each of the States of Nebraska and Kansas, and to each of the States that may be formed out the Territorities of Arizona, New Mexico, Oklahoma, and Utah, 1,000,000 acres of the surveyed public arid lands in said States, respectively, to be selected by each of said States within ten years after the passage of this act, and such reservation to take effect from the date of such selection and approval and be thereafter withheld from other disposal, except as hereinafter provided: *Provided*, That any lands so reserved which shall not be reclaimed within five years from the date of their selection and approval as aforesaid, or as to which the State has not expended or caused to be expended the sum of $3 per acre in works intended for the reclamation of such lands, as now required by the United States desert-land law from claimants thereunder, shall be released from such reservation and become subject to disposal as other public lands of the United States after proclamation by the President so declaring.

> That any State accepting the conditions of this section is hereby authorized to make all necessary regulations governing the manner or extent of the reclamation, and to make all contracts to cause said lands to be so reclaimed and settled and cultivated by actual settlers in accordance with such regulations; and as rapidly as the State may furnish competent proof that any of said lands are reclaimed and occupied by actual settlers, in accordance with its said regulations, patents shall issue to the State or its assigns for said lands so reclaimed and settled: *Provided*, That said States shall not sell or dispose of more than 160 acres of said lands to any one person, and the net proceeds derived by each State from the sale of said lands shall be held and expended as a separate fund to aid the work of reclaiming the lands so reserved by this section, and the surplus, if any, shall be devoted by the State to reclaiming other arid lands in said State.
>
> That all lands, exclusive of timber lands and mineral lands, which will not, without irrigation, produce some agricultural crop, shall be deemed arid lands within the meaning of this section, which fact shall be ascertained by affidavit of two or more credible witnesses, filed in the land office of the district in which such land may be situated at the time of the selection thereof, as herein provided: *Provided*, That this section shall not be construed to authorize the leasing of the lands selected or the disposal or use of them by the States, respectively, in any way whatever except to secure their reclamation, cultivation,

and settlement; and the Commissioner of the General Land Office shall, subject to the approval of the Secretary of the Interior, make all rules and regulations necessary to carry out the provisions of this section and to enable the Secretary of the Interior to examine any of the lands that may be selected under the provisions of this section, there is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, $1,000.

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